

**FEDERAL COMMUNICATIONS COMMISSION
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In re: NEW, Bloomfield, CT
Incom, L.L.C.
Application for Experimental
Broadcast Station

Gentlemen:

This letter refers to the October 27, 1998 application of Incom, L.L.C. ("Incom") to construct an experimental low power FM radio broadcast station in Bloomfield, Connecticut pursuant to 47 C.F.R.

§ 74.102. The proposal was supplemented on December 24, 1998. Specifically, Incom requests experimental authority to operate on Channel 287 with 90 watts effective radiated power, at an antenna height of 90 feet above ground level, from a site located in Bloomfield, which is a suburb of Hartford. Incom argues that its proposal will provide the Commission with empirical evidence concerning the technical and financial feasibility of low power FM broadcasting. Incom has filed a "Request for Expedited Action and Waiver of the Commission's Rules" in conjunction with its application for experimental authorization. In this pleading, Incom requests that the Commission take prompt action on its application and that it waive 47 C.F.R. § 74.182 in order to permit Incom to solicit and air advertisements on its proposed facility, ostensibly to ascertain whether or not a low power FM operation can be financially as well as technically viable.

Background

Mark Blake, Incom's President, operated an unlicensed, commercial FM radio station known as "Prayze FM," on 105.3 MHz in Bloomfield for approximately two years. Despite repeated warnings by

the then Compliance and Information (now Enforcement) Bureau to Blake that he was violating the law, i.e., 47 U.S.C. § 301, by operating without a license, Blake persisted in broadcasting without a license. In February 1998, Blake, Incom and Prayze FM filed a lawsuit against the Commission in United States District Court in Connecticut. The Prayze parties asked the court to issue a temporary restraining order ("TRO") to enjoin the Commission from enforcing the law against the unlicensed radio station known as Prayze FM. The District Court denied the application for a TRO on March 3, 1998.

Shortly thereafter, the Commission, represented by the United States Attorney's Office in Connecticut, filed a motion for injunctive and declaratory relief against Blake, Incom and Prayze FM. The Government's motion was granted by the District Court on September 11, 1998. Apparently unwilling to obey the law (47 U.S.C. § 301) and the District Court's decision, Prayze FM filed three motions to stay the effectiveness of the District Court's decision so that it could continue its illegal broadcasting activities. A United States Magistrate recommended a denial of a stay and the District Court agreed. Prayze FM then filed a notice of appeal and motion for stay with the United States Court of Appeals for the Second Circuit. The Court of Appeals denied the motion for stay on November 24, 1998, and ordered an expedited briefing schedule on the merits of Prayze FM's appeal.

Following oral argument, the Court of Appeals vacated the injunction and directed the District Court to supplement the record by making findings of fact and conclusions of law that constitute the grounds of its action, and to specify the conduct that is enjoined, while still retaining jurisdiction. On November 8, 1999, the District Court issued its ruling on the government's motion for a preliminary injunction. The District Court once again enjoined Prayze FM, Incom LLC, Mark Blake and all persons acting in concert with them from making radio transmissions within the United States until they first obtain a license from the FCC or other appropriate authorization in accordance with Section 301 of the Communications Act. Prayze FM resumed its unlicensed broadcasting shortly thereafter. The District Court twice found Prayze FM and its principals in contempt, but stayed the imposition of penalties pending the outcome in the Court of Appeals. The Court of Appeals then granted Prayze FM's motion for a writ of prohibition and prohibited the District Court from enforcing its injunction against Prayze FM pending the outcome of the appeal. The case has been scheduled for further briefing and oral argument may take place as early as the week of March 27, 2000.

At this time, it is our understanding that Prayze FM is on the air. With the foregoing in mind, we now turn to the instant application by Blake/Prayze FM/Incom for an "experimental" broadcast license.

Incom's Application

Applicants for experimental broadcast stations are required by 47 C.F.R. § 74.102 to propose operations "for the purpose of carrying on research and experimentation for the development and advancement of new broadcast technology, equipment, systems, or services which are more extensive than that which currently exists or which require other modes of transmission than can be accomplished by using a licensed broadcast station under an experimental authorization (see Section 73.1510)." In order to ensure the proper use of such an authorization, applicants are required by § 74.131(a)(1) to demonstrate that there is "a definite program of research and experimentation in the technical phases of broadcasting

which indicates reasonable promise of substantial contribution to the developments of the broadcast art." Furthermore, the applicant must establish that the research program could only be implemented via an experimental permit and that the program of research and experimentation will be conducted by qualified personnel. Finally, as indicated above, experimental stations authorized under Part 74 are prohibited by Section 74.182 from charging fees for producing or receiving compensation for or profit from the programming which they transmit over the experimental facilities. This provision is designed to ensure that applicants for experimental authorizations are actually engaged in research of benefit to the state of the art of broadcasting and not for self-aggrandizement. International Expo Information Broadcasters, Inc., 89 FCC 2d 1374, 1383 (1982).

In support of its proposal, Incom refers to a petition for rule making filed by J. Rodger Skinner. See Public Notice, Rule Making No. 9242 (February 20, 1998). That petition proposed that the Commission amend the existing rules to provide for a low power FM broadcast service. Incom contends that its proposal may "assist the FCC in expeditiously resolving the technical issues surrounding the creation of this new service." Request for Expedited Action and Waiver, at 2. We note that, the Commission recently released its Report and Order in MM Docket No. 99-25, In the Matter of Creation of Low Power Radio Service, FCC 00-19 (released January 27, 2000) ("LPFM Service Order") addressing Skinner's and other similar petitions. In the LPFM Service Order, the Commission established a new, low-power, FM radio service. Among other things, the Commission also adopted a rule requiring any "LPFM" applicant who at some time broadcast illegally to certify under penalty of perjury that: (1) it voluntarily ceased engaging in unlicensed operation prior to February 26, 1999 without specific direction to terminate by the Commission; or (2) it ceased operating any such facility within 24 hours of being advised by the Commission to do so. Id. at ¶¶ 54-56. See 47 C.F.R. §73.854(b). The decision to deny Incom's application for an experimental authorization is not based on the LPFM Service Order or on the new eligibility rule.

We conclude that Incom's application is not a bona fide experimental proposal under the provisions of Section 74.102. Technological experimentation is the benchmark of the experimental rules, id., and Incom's proposal does not demonstrate that it would make a contribution to the technological state of the art of broadcasting. Ponce Television Corporation, 1 FCC Rcd 1167, 1181 (1986); Greater Washington Educational Telecommunications Association, 53 FCC 2d 910, 918 (1975). See also Ponce Television Corporation, 4 FCC Rcd 5258 (1989), affd sub nom. Pegasus Broadcasting of San Juan, Inc., v. FCC, 901 F.2d 1130 (D.C. Cir. 1990) (table). Rather, Incom proposes to operate a conventional commercial FM broadcast station, albeit at a lower power than is currently permitted under the Commission's rules. The proposed operation is thus directly at odds with the purposes of the Commission's experimental broadcasting rules and must be rejected. See Capitol Broadcasting Company v. FCC, 257 F.2d 630, 632 (D.C. Cir. 1958) (Commission grant of experimental authorization reversed on appeal upon appellant's demonstration that "the application was, in substance, for . . . [a] regular commercial [broadcasting] operation). Because we find Incom's proposal to be defective vis-à-vis the Commission's experimental broadcast authorization rules, we need not reach its request for waiver of Section 74.182 concerning the solicitation of advertisements on experimental facilities.

Accordingly, Incom, L.L.C.'s "Request for Expedited Action and Waiver of the Commission's Rules"

IS HEREBY DENIED, and its application for a construction permit for a new experimental broadcast station on Channel 287 in Bloomfield, Connecticut also IS DENIED. We caution Incom and its President Mark Blake that **the operation of an unlicensed FM radio station is unauthorized and, therefore, illegal under Section 301 of the Communications Act, 47 U.S.C. § 301.**

Sincerely,

Linda Blair, Chief
Audio Services Division
Mass Media Bureau

cc: Incom, L.L.C.